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Supreme Court, U.S.
FILED

No. 09-135

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In The

Supreme Court of the United States

FRED A. GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a judicial determination that an object could not have contained a person precludes a finding that a government agent who peers therein during a "protective sweep" has not exceeded the permissible scope of such a search.

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OPINION BELOW

The United States Court of Appeals for the Eighth Circuit selected the opinion from which this proceeding arises for publication, and it appears at 560 F.3d 853. Along with the opinion, Petitioner has reproduced and included in the Appendix at App. 12-16 the District Court's order denying suppression of the evidence at issue, the Eighth Circuit's order denying Petitioner's petition for rehearing or rehearing *en banc*, and the relevant portion of the District Court's bench ruling.

JURISDICTIONAL STATEMENT

The Eighth Circuit filed its decision on March 26, 2009, and entered an order denying Petitioner's petition for rehearing or rehearing *en banc* on May 1, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review a circuit court's decision through a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. AMDT. 4

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This certiorari proceeding stems from a second superseding indictment filed against Petitioner Fred A. Green in the United States District Court for the Eastern District of Arkansas. That indictment charged Petitioner with four offenses, namely possession with intention to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841 and 846, possession of a firearm in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c)(1)(B)(ii), and possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). A jury trial resulted in guilty verdicts on all counts.

Government agents discovered some of the evidence underlying Petitioner's charges incident to a search of his residence in suburban Dallas, Texas. Prior to trial, Petitioner, citing a violation of his Fourth Amendment rights, sought suppression of those items, and the district court conducted a hearing shortly thereafter. Testimony elicited at the hearing revealed that the Arkansas State Police had requested the assistance of the United States Marshal Service in serving an unlawful-flight-to-avoid-prosecution warrant upon Petitioner. After an investigation as to Petitioner's whereabouts concluded,

members of the Dallas, Texas Fugitive Apprehension Strike Team ("FAST Team"), which consisted of United States Marshal Service deputies and local police officers in the Dallas area, entered Petitioner's residence in the suburb of Desoto and effected his arrest.

Incident to the entry of Petitioner's residence, FAST Team members conducted a "protective sweep." During this process, FAST Team member Kurt Hibbets of the Dallas Police Department encountered a large dresser in the master bedroom on the first floor of the residence. Hibbets repeatedly testified that the dresser had a top large enough to conceal a person and that from the ground he had no idea how deep it was. He agreed that 20 heel-to-toe steps fairly approximated the distance between the dresser and the master bedroom door and estimated the dresser to be six feet long, two-and-a-half to three feet wide, and seven feet tall. He stated that the dresser was of such a height that he had to use a chair or step to look at the top, which he in fact did. Upon his ascent, he looked down into a six-inch-deep by one-and-one-half foot wide opening and thereby discovered $13,664 in United States currency, a MAC-10 style nine-millimeter firearm with two magazines, and a small Derringer 410½-inch barreled gun.

During the hearing, Hibbets viewed a photograph of the dresser and testified that it looked similar to, but not as deep as the dresser that he encountered. After Hibbets left the stand, Tyrone Thompson, the owner of the residence, confirmed that the photograph

viewed by Hibbets depicted the dresser in the master bedroom of the residence. Thompson identified other photographs introduced by the defense as fair and accurate representations of the same dresser.

Greg Williams, a private investigator employed by the defense, testified that he took the photographs previously viewed by Hibbets and Thompson and that he measured the dresser, which was 71 inches high, 68 inches wide, and 13 inches deep at the top. The top of the dresser had an opening or "box" that measured 11 inches from front to back and 46 inches from side to side, with a depth that ranged from five-and-one-half to six-and-one-half inches.

Based upon the testimony, the district court concluded that a person could not be positioned on top of the dresser and not be visible to someone in the room. App. 16. It ruled, however, that an officer could reasonably have thought someone was on top of the dresser, thereby justifying an examination thereof, which would have brought any contraband within "plain view." App. 16. On appeal, Petitioner argued that the district court clearly erred by denying suppression of the items discovered on top of the dresser. Specifically, he maintained that if Hibbets had not encountered a dresser similar to that at issue, he would have had no reason to believe that the top consisted of anything other than a flat surface. Petitioner further observed that if Hibbets had previously encountered such an item, he would have known that the opening at the top could not have concealed a person. Petitioner acknowledged that the circumstances

of a protective sweep call for split-second decisions but asserted that urgency attending such situations would not have altered human perception to such an extent that Hibbets would not have realized that the top of the dresser could not have concealed a person prior to looking down into the "box."

Characterizing the issue as "close," the Eighth Circuit affirmed the district court's refusal to suppress the items discovered on top of the dresser. App. 5. It concluded that Hibbet's action constituted "an objectively reasonable step to ensure officer safety that brought incriminating items into plain view[,]" and it noted that, in such situations, courts "'should not, in the quiet of [their] chambers, look with eagle's eyes to spy out flaws in the officers' reasoning after the fact.'" App. 5, *quoting United States v. Bruton*, 647 F.2d 818, 823 (8th Cir.), *cert. denied*, 454 U.S. 868, 102 S. Ct. 333 (1981).

After the Eighth Circuit delivered its opinion, Petitioner sought rehearing or rehearing *en banc* on the ground that the proceeding presented a question of exceptional importance pursuant to Fed. R. App. P. 35(b)(1)(B) in that it involved an issue on which the panel decision conflicts with an authoritative decision of another United States Court of Appeal, namely *United States v. Wilson*, 36 F.3d 1298 (5th Cir. 1994). The Eighth Circuit denied the petition on May 1, 2009. App. 16.

REASON FOR GRANTING THE PETITION

THE DISTRICT COURT CLEARLY ERRED BY FINDING THAT AN OFFICER WHO PEERED INTO AN AREA THAT THE DISTRICT COURT DETERMINED COULD NOT HAVE CONCEALED A PERSON DID NOT THEREBY EXCEED THE PERMISSIBLE SCOPE OF A "PROTECTIVE SWEEP," AND THIS COURT SHOULD RESOLVE THE CONFLICT OF THE DECISION OF THE EIGHTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S RULING WITH THAT OF DECISIONS RENDERED BY THE FIFTH CIRCUIT ON THE SAME IMPORTANT MATTER.

With respect to the items found on top of the dresser, the Eighth Circuit's decision in this case conflicts with that of the Fifth Circuit in *United States v. Wilson*, 36 F.3d 1298 (5th Cir. 1994). *Wilson* involved a situation in which a police officer assisted a federal agent in investigating the appellant, Wilson, who was suspected of stealing checks from the mail. *Id.* at 1301. While conducting a purported "protective sweep" of a hotel room occupied by Wilson, the police officer entered a bathroom and, using a flashlight, saw an object in the wastebasket. *Id.* Upon closer inspection, the police officer determined that the checkbook contained checks stolen by Wilson. *Id.*

On appeal, the Fifth Circuit rejected the Government's argument that discovery of the checks resulted from a valid protective sweep inasmuch as the search was not conducted incident to an arrest. *Id.* at

1306. Nonetheless, the Fifth Circuit, citing *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 1094 (1990), noted that, under the circumstances, the seizure of the checkbook did not fall within the narrow ambit of a cursory visual inspection of a place where a person could be hiding. *Wilson*, 36 F.3d at 1306. In *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004), the Fifth Circuit held that an in-home protective sweep is not invalid merely because it does not occur incident to an arrest and disapproved of *Wilson*'s language to the contrary. *Gould*, 364 F.3d at 586. Nonetheless, it noted its agreement with *Wilson*'s conclusion that the search of the wastebasket and subsequent seizure of the checkbook fell outside the permissible scope of a protective sweep. *Id.*

Wilson and *Gould* reveal that the Fifth Circuit will suppress the fruits of a purported protective sweep if a government agent participating therein discovered the evidence by peering into a container that he or she knew, or should have known, could not have concealed a person. In this case, the involved government agent should have known, prior to peering down into the "box" on top of the dresser, that the space in question could not have concealed a person and was not concealing a person. Instead of stepping down from the chair in the split-second that would have been required to ascertain the absence of a person, the agent took time to look into the opening, thereby discovering the evidence at issue. Those facts

notwithstanding, the district court denied suppression, and the Eighth Circuit affirmed.

In light of the disparate results that have arisen from two factually similar situations, a conflict clearly exists between the Eighth Circuit's holding in this case and the Fifth's Circuit's holdings in *Wilson* and *Gould*. Petitioner submits that *Wilson* and *Gould* adhere more closely to the Fourth Amendment as interpreted by *Buie* and prays that this Court resolve that conflict.

CONCLUSION

Petitioner prays that this Court grant certiorari and reverse the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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560 F.3d 853

United States Court of Appeals,
Eighth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Fred A. GREEN, Defendant-Appellant.
No. 08-1680.

Submitted: Dec. 8, 2008.
Filed: March 26, 2009.
Rehearing and Rehearing En Banc
Denied May 1, 2009.

Lucas Wayne Zakrzewski, Pine Bluff, AR, for appellant.

Edward O. Walker, Anne E. Gardner, AUSA, Little Rock, AR, for appellee.

Before LOKEN, Chief Judge, BEAM and ARNOLD, Circuit Judges.

LOKEN, Chief Judge.

A jury convicted **Fred A. Green** of possession with intent to distribute cocaine, conspiracy to distribute cocaine, possession of a machine gun in furtherance of drug trafficking, and being a felon in possession of a firearm. He was sentenced to 548 months in prison. *See* 18 U.S.C. § 924(c)(1)(B)(ii). Green appeals his conviction, arguing that the district court[1] erred in not suppressing evidence found during a

---

[1] The HONORABLE JAMES M. MOODY, United States District Judge for the Eastern District of Arkansas.

protective sweep of his residence at the time of his arrest, and in not declaring a mistrial on account of the government's improper rebuttal argument. We affirm.

I. Suppression Issues

After extensive investigation and surveillance, United States Marshals and Dallas police officers executed an Arkansas fugitive arrest warrant at Green's residence in a Dallas suburb. Upon entering, the officers secured four other men found in the living room and spread out in the large house to conduct a protective sweep and to search for Green. Deputy Marshal Thomas Kinsella and Police Officer Kurt Hibbits proceeded to the kitchen area. Marshal Kinsella entered a large pantry and saw in plain view a duffel bag with a clear plastic bag "with white powdery substance sticking out." The duffel bag was seized and found to contain 486 grams of cocaine, 145 grams of methamphetamine, and digital scales.

Meanwhile, Officer Hibbits went through the kitchen to the attached garage, where Green was located and arrested. Other officers continued the protective sweep without a search warrant, seizing various items. At issue on appeal are the drugs in the duffel bag; a MAC-10 9mm machine gun with two magazines, a Derringer .410 caliber pistol, and $13,664 in cash found on top of a six foot dresser in the master bedroom; an SKS .308 caliber rifle found in a large bedroom closet; and 229 rounds of 9mm

ammunition for the MAC-10 machine gun and nine rounds of .410 caliber ammunition for the Derringer. Green argues that the officers exceeded the permissible limits of a protective sweep in seizing this evidence. We review the district court's findings of fact for clear error and the ultimate question whether the Fourth Amendment was violated de novo. *United States v. Walsh,* 299 F.3d 729, 730 (8th Cir.), *cert. denied,* 537 U.S. 1066, 123 S.Ct. 617, 154 L.Ed.2d 554 (2002).

"The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie,* 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). To be "properly limited," a protective sweep must be "a quick and limited search of premises . . . conducted to protect the safety of police officers or others [and] narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* at 327, 110 S.Ct. 1093. "[A]n officer arresting a suspected drug trafficker in one room of a multi-room residence is justified in conducting a Buie sweep out of concern that there could be individuals lurking in the other rooms who may resort to violence to thwart the arrest." *United States v. Cash,* 378 F.3d 745, 749 (8th Cir.2004), *cert. denied,* 544 U.S. 963, 125 S.Ct. 1727, 161 L.Ed.2d 606 (2005).

During a properly limited protective sweep, the police may seize an item that is in plain view if its incriminating character is "immediately apparent." *Horton v. California,* 496 U.S. 128, 136, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). The government bears the burden of proving that this exception to the search warrant requirement applies. *United States v. Weston,* 443 F.3d 661, 667 (8th Cir.), *cert. denied,* 549 U.S. 956, 127 S.Ct. 417, ___ L.Ed.2d ___ (2006).

A. Evidence Found on Top of the Dresser. The suppression hearing evidence established that the master bedroom dresser was 71" high, 68" wide, and 13" deep at the top. Officer Hibbets testified that he could not see on top of the dresser from the floor, but the space was large enough to conceal a person. Therefore, the government argued, officer safety warranted stepping on a chair to ensure that no one was hiding there. Once level with the top, the officer could see down into a six-inch depression, and the two handguns and cash came into plain view. After hearing testimony by Green's investigator, who measured and photographed the dresser in detail, the district court found that a person on top of the dresser would in fact have been visible from the floor to a police officer conducting a protective sweep of the bedroom. However, the court denied suppression, explaining: "But I don't think that that's the test here. I think the test is whether that officer could reasonably think that someone might be on top of that dresser and justify examining the area."

On appeal, Green argues that the photographs of the dresser "reveal that the top portion could not have concealed a person." He adds that, "during the process of standing on a chair," the officer "should have realized . . . during his ascent, that [the dresser] could not have concealed a person," an argument not made to the district court. Though the issue is close, we agree with the district court's ruling. Officers conducting a protective sweep must act quickly and decisively to minimize the risk of ambush. *See Buie,* 494 U.S. at 333, 110 S.Ct. 1093. They must be allowed to verify that potential hiding spaces are empty. Here, the officer stood on a chair to obtain a better view of a location where it was reasonable to believe a person could be hiding. Like the district court, we conclude that action was an objectively reasonable step to ensure officer safety that brought incriminating items into plain view. In these situations, "[w]e should not, in the quiet of our chambers, look with eagle's eyes to spy out flaws in the officers' reasoning after the fact." *United States v. Bruton,* 647 F.2d 818, 823 (8th Cir.), *cert. denied,* 454 U.S. 868, 102 S.Ct. 333, 70 L.Ed.2d 170 (1981).

B. The SKS Rifle and Ammunition. Conceding that the upstairs closet was large enough to conceal a person, Green argues that the government failed to prove that this evidence was found in plain view because "the only witness to testify about the ammunition and the .308 SKS rifle, [Officer] Hibbets, could not testify as to where those items were located." The district court credited Officer Hibbets's

testimony that another officer said the rifle was visible as soon as he opened the closet door. Though Hibbets was not the officer who did the protective sweep of the closet, "the district court may rely on hearsay evidence at a suppression hearing." *United States v. Thompson,* 533 F.3d 964, 969 (8th Cir.2008). The court's assessment of witness credibility is "virtually unreviewable" on appeal. *United States v. Behler,* 187 F.3d 772, 777 (8th Cir.1999). After careful review, we conclude the court's finding that the rifle was in the plain view of an officer conducting a protective sweep of the closet was not clearly erroneous.

At the conclusion of the suppression hearing, Green argued that the ammunition must be suppressed because Hibbets could not recall where it was found. The district court did not refer to the ammunition in its oral decision (or a subsequent written ruling); Green failed to question this omission. When the government offered the 9mm and .410 caliber ammunition into evidence at trial, Green renewed his motion to suppress. The court replied, "I considered all the evidence on the motion to suppress and the motion is denied." Again, Green failed to point out that the court had not expressly ruled on the ammunition. Though admitted into evidence, the ammunition was not mentioned during closing arguments and was of little relevance to the charges against Green – drug trafficking and unlawful possession of a machine gun. In these circumstances, even if the government failed to present evidence that the ammunition was found in plain view during the

protective sweep, Green's lack of diligence in pursuing the issue confirms our conclusion that admission of the ammunition at trial was harmless error. *See United States v. Blom,* 242 F.3d 799, 809 (8th Cir.), *cert. denied,* 534 U.S. 880, 122 S.Ct. 184, 151 L.Ed.2d 128 (2001).

C. The Drugs in the Pantry. Assuming that the pantry was a large area appropriate for a protective sweep, and that the duffel bag with drugs sticking out was in Deputy Marshal Kinsella's plain view, Green argues that the drugs must be suppressed because they resemble other items commonly found in a panty, such as sugar, flour, and wheat, and therefore their incriminating character was not "immediately apparent." The Supreme Court has clarified that "immediately apparent" in this Fourth Amendment context means that the police have probable cause to believe an item is incriminating. *Skokos v. Rhoades,* 440 F.3d 957, 961 (8th Cir.2006), citing *Texas v. Brown,* 460 U.S. 730, 741-42, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). "Probable cause demands . . . only that the facts available to a reasonably cautious man would warrant a belief that certain items may be contraband or stolen property or useful as evidence of a crime." *United States v. Garner,* 907 F.2d 60, 62 (8th Cir.1990) (quotations omitted), *cert. denied,* 498 U.S. 1068, 111 S.Ct. 787, 112 L.Ed.2d 849 (1991).

Kinsella testified that he has served over five hundred arrest warrants, knew that Green's arrest warrant was for drug-related offenses, and could

recognize cocaine and methamphetamine, though not with certainty. Upon entering, he saw a clear plastic bag containing a white powdery substance that looked like cocaine sticking out of a dark duffel bag sitting on a cooler just inside the pantry. We agree with the district court that Kinsella had probable cause to seize the duffel bag when he observed what he thought was contraband in the form of drugs in plain view. Therefore, suppression of the drugs was properly denied.

II. The Government's Rebuttal Argument

Green argues that the district court committed plain error in failing to declare a mistrial, *sua sponte,* when the prosecutor made two improper statements during rebuttal closing argument. First, the prosecutor stated: "You know, we could have sat here all day and had you listen to a number of witnesses that have come through and talked to the government about their involvement that have already pled guilty in this." One transcript page later, the prosecutor in referring to the recording of a phone conversation between Green and his sister that had been admitted in evidence stated: "you can fast-forward it to about 12 minutes, 40 seconds. And there's a disturbing part where he's talking about there's nothing wrong with distributing product to, I assume, infidels or whomever that are not the children of Israel."

Following this argument, defense counsel stated, outside the jury's presence:

> I did not interrupt closing argument. I probably should have for the record. First thing, it is improper to argue we had other witnesses who could testify to this, but we didn't bring those witnesses, because these people were related to Fred Green.
>
> * * *
>
> The last thing is, he refers to the phone call. . . . [Green] doesn't make those references like [the prosecutor] said in his argument. His sister makes those references, and Fred actually says "huh," like he can't understand what's going on.

The court noted it remembered the sister made that comment and asked:

> THE COURT: What do you want me to do?
>
> * * *
>
> [DEFENSE COUNSEL]: I'm not going to ask for a mistrial. . . . I would like for the Court to consider admonishing the jury on those two points I just raised.

The district court then instructed the jury, without further objection:

> Ladies and gentlemen, one final comment. With respect to the statements that [the prosecutor] may have made about witnesses that could have been called by the government to bolster their case, I think you understand that you are to decide the case just on the evidence that you heard during the trial, not by any speculative evidence

> that might have been brought to the trial. So you will only consider the exhibits and the testimony that you heard during the trial in your deliberations.

On appeal, Green and the Government agree that, because Green did not request a mistrial, we review the failure to grant that relief for plain error. Without question, in the absence of a timely objection, it is usually appropriate to review for plain error whether a prosecutor's improper statements during closing argument warrant a new trial. *See United States v. Young,* 470 U.S. 1, 6, 14-16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Davis,* 534 F.3d 903, 914 (8th Cir.2008), *cert. denied,* ___ U.S. ___, 129 S.Ct. 1388, ___ L.Ed.2d ___ (2009). Here, we question whether even plain error review is appropriate because (i) Green's attorney explicitly declined to request a mistrial, and (ii) the district court gave a curative instruction, as Green requested, and Green did not object to the instruction given. As we said in *United States v. Thompson,* 289 F.3d 524, 526 (8th Cir.2002), "[o]n appeal, [Green] cannot complain that the district court gave him exactly what his lawyer asked." On the other hand, we reviewed the failure to order a new trial for plain error under similar circumstances in *United States v. Ehrmann,* 421 F.3d 774, 783 (8th Cir.2005), *cert. denied,* 546 U.S. 1122, 126 S.Ct. 1099, 163 L.Ed.2d 912 (2006).

Assuming without deciding that plain error review is required, we conclude there was no plain error in this case. First, the prosecutor's reference to other

witnesses the government could have called was clearly improper. But the district court's curative instruction, noting that reference, and reminding the jury it must base its decision only on the evidence presented at trial, squarely addressed both the comment and the reason it was improper. Second, the prosecutor incorrectly attributed a prejudicial comment in a phone conversation to Green, rather than to his sister. But in the same comment, the prosecutor urged the jury to listen to that portion of the tape, which would have reminded the jury who made the comment (a reminder the district court did not need). The court's curative instruction, while not directed to this comment, told the jury to base its decision on the evidence presented, which would cure the prosecutor's factual error. Green did not request a more explicit instruction. In these circumstances, the failure to declare a mistrial *sua sponte* was not reversible error, *see United States v. Chase,* 451 F.3d 474, 481 (8th Cir.2006), and certainly was not plain error, *compare United States v. Carter,* 410 F.3d 1017, 1026 (8th Cir.2005).

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

VS.

FRED A. GREEN

CASE NO. 4:06CR00093 JMM

ORDER

(Filed Apr. 17, 2007)

For the reasons stated into the record at the conclusion of the April 16, 2007 hearing, defendant's motion to suppress is granted in part and denied in part (#48). The officers execution of the arrest warrant, the protective sweep of defendant's home, and the seizure of items in plain sight were reasonable and not in violation of the Fourth Amendment. However, as stated at the hearing, seizure of the items which were not in plain sight was unreasonable and would be in violation of defendant's Fourth Amendment rights.

Based upon the Court's findings, the government is precluded from presenting any evidence regarding the Sten gun found in the attic of defendant's home and any evidence obtained from the hard drive of defendant's computer. The government may present evidence of the drugs that were found in the pantry, the firearm found in the closet, and the money and firearm found on top of dresser.

IT IS SO ORDERED THIS 17 day of April, 2007.

/s/ James M Moody
James M. Moody
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-1680

United States of America,

Appellee

v.

Fred A. Green, also known as Big Dog,

Appellant

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:06-cr-00093-JMM-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 01, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

v.

FRED A. GREEN,

Defendant.

No. 4:06CR00093-JMM

Monday, April 16, 2007
Little Rock, Arkansas
1:38 p.m.

TRANSCRIPT OF HEARING
ON MOTION TO SUPPRESS
BEFORE THE HONORABLE JAMES M. MOODY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Pine Bluff, Arkansas 71612-1329

Defendant Present

Proceedings reported by machine stenography and displayed in realtime; transcript prepared utilizing computer-aided transcription.

Elaine Hinson, RMR, CRR, CCR
United States Court Reporter

* * *

[159] I have a lot more problem with the cash and the guns that are on top of the dresser. But I do believe that, and based on the testimony of Officer Hibbets, that when he entered the room – and I'll have to credit his testimony, because, obviously, based on the testimony of the investigator and Mr. Thompson, Mr. Williams and Mr. Thompson in hindsight, there's no way that someone could be positioned on top of that dresser and [160] not be visible to someone in the room. But I don't think that that's the test here. I think the test is whether that officer could reasonably think that someone might be on top of that dresser and justify examining that area. And once you look up there, I think all of these objects that were found there would be in plain view.

* * *
